



**Billing Code: 3410-30-P**

## **DEPARTMENT OF AGRICULTURE**

### **Food and Nutrition Service**

#### **7 CFR Parts 210 and 235**

**[FNS-2017-0039]**

**RIN 0584-AE60**

#### **Hiring Flexibility under Professional Standards**

**AGENCY:** Food and Nutrition Service (FNS), USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would add four flexibilities to the hiring standards for new school nutrition program directors in small local educational agencies (LEAs) and new school nutrition program State directors under the professional standards regulations for the National School Lunch and School Breakfast Programs. First, to address the hiring challenge faced by small LEAs, those with 2,499 or fewer students, this rule would require relevant food service experience rather than school nutrition program experience for new directors. Second, it would provide State agencies with discretion to consider volunteer or unpaid work as relevant food service experience for new school nutrition program directors in small LEAs. Third, to further assist LEAs with less than 500 students, this proposed rule would expand the existing regulatory flexibility which gives State agencies discretion to accept less than the required years of food service experience when an applicant for a new director position has the minimum required education. Fourth, this rule would also add flexibility to the hiring standards for State directors of

school nutrition programs by considering applicants with either a bachelor's or a master's degree in specific, relevant fields. These proposed changes are expected to expand the pool of candidates qualified to serve as leaders in the school nutrition programs while continuing to ensure that school nutrition professionals are able to perform their duties effectively and efficiently.

**DATES:** Written comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] to be assured of consideration.

**ADDRESSES:** The Food and Nutrition Service, USDA, invites interested persons to submit written comments on this proposed rule. Comments may be submitted in writing by one of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- Mail: Send comments to School Programs Branch, Policy and Program Development Division, Food and Nutrition Service, 3101 Park Center Drive, 12<sup>th</sup> floor, Alexandria, Virginia 22302.

All written comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. FNS will make the written comments publicly available on the Internet via <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Tina Namian, Chief, School Programs Branch, Policy and Program Development Division, Food and Nutrition Service, 3101 Park Center Drive, 12th floor, Alexandria, Virginia 22302; 703-305-2590.

**SUPPLEMENTARY INFORMATION:**

On July 1, 2015, FNS implemented professional standards for school nutrition personnel who manage and operate the National School Lunch Program (NSLP) and School Breakfast Program (SBP), as required by the final rule Professional Standards for State and Local School Nutrition Programs Personnel as Required by the Healthy, Hunger-Free Kids Act of 2010 (80 FR 11077) and section 7(g) of the Child Nutrition Act of 1966 (42 U.S.C. 1776(g)). The professional standards consist of hiring and training standards as follows:

- Hiring standards for new school nutrition program directors of school food authorities (SFAs). These hiring standards, established at 7 CFR 210.30(b)(1)(i), (ii) and (iii), are based on student enrollment for three local educational agency (LEA) sizes: 2,499 students or less; 2,500-9,999 students; and 10,000 or more students.
- Hiring standards for new State directors of school nutrition programs and new State directors of distributing agencies. These hiring standards are established at 7 CFR 235.11(g)(1) and (2), respectively.
- Annual training hours for all State directors of school nutrition programs and all State directors of distributing agencies (established at 7 CFR 235.11(g)(3) and (4)); and annual training hours for all local school nutrition program

personnel—directors (at 7 CFR 210.30(b)(3)), managers (at 7 CFR 210.30(c)), and staff (at 7 CFR 210.30(d)).

The professional standards are intended to ensure that school nutrition professionals who manage and operate the NSLP and SBP have adequate knowledge and training to meet program requirements. Requiring proper qualifications to serve in the NSLP and SBP is expected to improve the quality of school meals, reduce errors, and enhance program integrity.

#### School Nutrition Program Directors

As explained earlier, at the local level, the hiring standards are based on the LEA size. To facilitate recruitment and hiring of new SFA directors in small LEAs with less than 500 students, current regulations at 7 CFR 210.30(b)(1)(i)(D) give State agencies discretion to allow the hiring of a new school nutrition program director who holds a high school diploma but less than the required three years of school nutrition program experience.

Since implementation of the professional standards in 2015, FNS has received multiple inquiries from State agencies on behalf of SFAs that are facing challenges with the hiring standards applicable to LEAs with 500 to 2,499 students. The majority of the inquiries and/or waiver requests received by FNS originated in the Mountain Plains Region, which includes States with small LEAs such as those in rural and/or in Tribal communities.

These small LEAs often have difficulty recruiting new school nutrition program directors

with previous school nutrition program experience, as currently required by the professional standards regulations.

The current regulations at 7 CFR 210.30(b)(1)(i) require from one to three years of prior school nutrition program experience, depending on the level of education attained by the new director. Applicants with an associate's degree, or the equivalent, in a relevant field are required to have at least one year of relevant school nutrition program experience. Applicants with a high school diploma, or the equivalent, are required to have at least three years of relevant school nutrition program experience. School nutrition program experience is not required for new directors with: (1) a bachelor's degree or higher with a specific academic major in food and nutrition, food service management, dietetics, family and consumer sciences, nutrition education, culinary arts, business, or a related field; or (2) a bachelor's degree with any academic major or area of concentration and a State-recognized certificate for school nutrition directors.

Informal input received by FNS at State agency meetings and through other State agency contacts reveals that SFAs operating in small LEAs, particularly those in rural or less populated areas, often struggle to find applicants with school nutrition program experience. In the school meal programs, there are approximately 6,500 LEAs with an enrollment between 500-2,499 students, which represents about 36 percent of the LEA population nationwide. These small LEAs are found in States across the nation, including California, Colorado, Iowa, Montana, New Mexico, South Dakota, and Wisconsin. For example, within the last two years, six SFAs in one State agency were diligent in

advertising director vacancies but were not able to hire new directors with the required school nutrition program experience due to the limited pool of applicants in the local labor market. Most applicants in these small LEAs have acquired relevant food service experience by working as managers or chefs at local restaurants and healthcare facilities. If a SFA hires a new director without the required education or school nutrition program experience, in violation of program requirements, the SFA is not permitted to use funds from the non-profit school food service account, which includes NSLP and SBP reimbursements, to pay the salary of the director at issue. This fiscal impact could jeopardize a SFA's financial viability and ability to participate in the NSLP and SBP.

To assist these SFAs with this challenge and provide more local control over hiring decisions that reflect their unique labor markets, FNS proposes the following changes to the hiring standards at 7 CFR 210.30(b)(1)(i) for LEAs with 2,499 students or less:

- Remove the school nutrition program experience requirement for new directors, and instead require relevant food service experience for this LEA size only;
- Provide State agencies the discretion to consider applicants' volunteer or unpaid food service experience on a case-by-case basis. This optional flexibility is expected to be particularly useful for small LEAs, such as charter and Tribal schools; and
- In small LEAs with less than 500 students, provide the State agency discretion to approve the hire of a director who has less than the required years of food service experience, provided that the applicant has the minimum education specified in the hiring standards for LEAs with 2,499 students or less.

These proposed flexibilities are intended to provide LEAs with 2,499 students or less increased access to a larger pool of applicants with relevant food service experience gained inside or outside the NSLP/SBP and applicable to the director's position. This food service experience could be either in a paid food service position (e.g., restaurant manager or cook) or could be gained in an unpaid food service position (e.g., an unpaid apprenticeship/internship program or as a volunteer food service work in a community organization, such as a homeless shelter). The flexibility to consider unpaid experience, which is available at the discretion of the State agency on a case-by-case basis, acknowledges that in small communities there are few employment opportunities in food service but residents often volunteer to manage food service activities for civic and community organizations. Upon implementation of this proposed rule, an applicant with paid and/or unpaid experience managing the food service at a healthcare facility, restaurant, civic/community organization, or other type of establishment could be considered for a director's position, provided that the applicant also has the required education.

To provide additional assistance to small LEAs with less than 500 students, this proposed rule would modify the current optional flexibility at 7 CFR 210.30(b)(1)(i)(D), which provides State agencies discretion to allow an SFA to hire a new school nutrition program director with a high school diploma and less than the required years of experience. This proposed rule would allow the State agency to apply this optional flexibility to address hiring issues in LEAs with less than 500 students if an applicant has either a high school

diploma, an associate's degree, or a bachelor's degree but less than the required years of food service experience. Ideally, a new program director in this situation would have some paid or unpaid food service experience. By expanding the existing optional flexibility at §210.30(b)(1)(i)(D) to include other educational levels, FNS affirms its commitment to provide small LEAs with less than 500 students more local control to address their unique hiring challenges.

Based on the inquiries, waiver requests, and anecdotal input from State agencies, FNS understands that these proposed flexibilities would be helpful for LEAs with 2,499 students or less, such as rural and Tribal schools, residential child care institutions, and charter schools. It is important to stress that these proposed flexibilities only address the specialized experience requirement at 7 CFR 210.30(b)(1)(i) and would not affect the number of years of experience required, which ranges from one to three years based on the level of education of the new director, except in specific situations where the State agency may use its discretion to assist an LEA with less than 500 students (as explained earlier).

Also, although this proposed rule would remove the specialized experience requirement for new SFA directors in LEAs with 2,499 students or less, hiring a new school nutrition program director with school nutrition program experience is a best practice. Minimizing the learning curve helps contribute to a smooth transition during a personnel change, especially at this level of program administration. Otherwise, significant State agency support and guidance would be essential during the first year to ensure that the new



director is able to manage the SFA's meal service as required by program regulations. Additionally, the Orientation to School Nutrition Management Seminar and other training resources from the Institute of Child Nutrition are available to help a new director who has little or no program experience conduct the day-to-day operations of the NSLP and SBP successfully.

This proposed rule would not amend the school nutrition program experience requirement for new directors in larger LEAs, those with 2,500 students or more. Operational experience since implementation of the professional standards in 2015 has not revealed issues with the experience requirement for larger LEAs, which are often located in large towns or cities in urban areas. FNS understands that such LEAs, which have a more complex school food service operation, generally have access to a more robust pool of applicants. Therefore, specific school nutrition program experience would remain in place for new directors in LEAs with 2,500 students or more, as required under 7 CFR §210.30(b)(1)(ii) and (iii).

#### State Directors

At the State agency level, the professional standards consist of hiring standards for new State directors of school nutrition programs, hiring standards for new directors of distributing agencies, and annual training standards for new and current State directors. These requirements are established at 7 CFR 235.11(g).

FNS is proposing to allow flexibility in the hiring standards for new State directors of school nutrition programs to attract a larger number of professionals qualified to lead and manage the school nutrition programs statewide. For a new State director of school nutrition programs, the current regulations at 7 CFR 235.11(g)(1)(i) require a bachelor's degree with an academic major in food and nutrition, food service management, dietetics, family and consumer sciences, nutrition education, culinary arts, business, or a related field. A master's degree in one of the specified fields is strongly preferred.

To accommodate applicants who have a master's degree in one of the specified fields but a bachelor's degree in a non-related field, FNS proposes to add a master's degree in a relevant field to the basic qualifications listed in 7 CFR 235.11(g)(1)(i). This is intended to help ensure that highly educated individuals are not unintentionally prevented from serving as State director of school nutrition programs. Adding a master's degree in a relevant field to the basic qualifications acknowledges that many professionals change careers and gain relevant experience through advanced education in areas relevant to school nutrition. For example, a State agency supervisor who has a bachelor's degree in political science and a master's degree in nutrition education or public administration could be considered to serve as a State director of school nutrition programs.

Accordingly, this proposed rule would add more flexibility to the hiring standards in 7 CFR 210.30(b)(1)(i) for new LEA-level school nutrition program directors, and in 7 CFR 235.11(g)(1)(i) for new statewide school nutrition program directors to expand the pool of candidates qualified to serve in the school nutrition programs. FNS invites public

comments on the specific flexibilities addressed in this proposed rule. Public comments will be extremely helpful in the development of the final rule.

## **Procedural Matters**

### **Executive Order 12866 and 13563**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This proposed rule promotes flexibility in the hiring standards for State and local school nutrition personnel but has no measurable costs or benefits. This rule has been determined to be not significant and was not reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866.

### Regulatory Impact Analysis

This rule has been designated as not significant by the Office of Management and Budget; therefore, no Regulatory Impact Analysis is required.

### Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any

significant impacts on a substantial number of small entities. Pursuant to that review, it has been certified that this rule would not have a significant impact on a substantial number of small entities. This proposed rule would not have an adverse impact on small entities in the National School Lunch Program and School Breakfast Program rather it would ease program operations by adding flexibility in the hiring standards for new directors in small local educational agencies and new directors of State agencies.

Impact: The provisions of this proposed rule would apply to LEAs with 2,499 students or less, and to State agencies operating the National School Lunch Program and School Breakfast Program. These entities meet the definitions of “small governmental jurisdiction” and “small entity” in the Regulatory Flexibility Act. These entities would be able to quickly benefit from the hiring flexibilities proposed in this rule.

### **Executive Order 13771**

This proposed rule is an EO 13771 deregulatory action that seeks to ease the professional standards regulations for State directors of school nutrition programs and for school nutrition program directors in small LEAs with 2,499 students or less, which are often found in rural communities facing labor market challenges. This rule addresses hiring challenges identified by the State agencies that administer the Child Nutrition Programs. It would add flexibility to hiring standards by expanding the range of allowable education for new State directors, and the range of allowable food service experience for new local directors in small LEAs.

## **Unfunded Mandates Reform Act**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures by State, local or Tribal governments, in the aggregate, or the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This proposed rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and Tribal governments or the private sector of \$100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

## **Executive Order 12372**

The National School Lunch Program and School Breakfast Program are listed in the Catalog of Federal Domestic Assistance under Number 10.555 and Number 10.553, respectively, and are subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 2 CFR chapter IV.) Since the Child Nutrition Programs are State-administered, USDA’s Food and Nutrition Service (FNS)

Regional Offices have formal and informal discussions with State and local officials, including representatives of Indian Tribal Organizations, on an ongoing basis regarding program requirements and operation. Discussions also take place in response to technical assistance requests submitted by the State agencies to the FNS Regional Offices. This regular interaction with State and local operators provides FNS valuable input that informs rulemaking. Based on the inquiries and waiver requests from the State agencies disclosing challenges with the professional standards regulations, FNS is proposing specific flexibilities to address the requirement issues in a manner that promotes program efficiency and effectiveness.

#### **Federalism Summary Impact Statement**

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under Section (6)(b)(2)(B) of Executive Order 13121.

The Department has considered the impact of this rule on State and local governments and has determined that this rule does not have federalism implications. Therefore, under section 6(b) of the Executive Order, a federalism summary is not required.

#### **Executive Order 12988, Civil Justice Reform**

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule is not intended to have retroactive effect. Prior to any judicial challenge to the provisions of this rule, all applicable administrative procedures must be exhausted.

### **Civil Rights Impact Analysis**

FNS has reviewed this proposed rule in accordance with USDA Regulation 4300-4, “Civil Rights Impact Analysis,” to identify any major civil rights impacts the rule might have on Program participants on the basis of age, race, color, national origin, sex or disability. After a careful review of the rule’s intent and provisions, FNS has determined that this rule is not expected to affect the participation of protected individuals in the National School Lunch Program and School Breakfast Program, or limit the ability of protected classes of individuals to serve as new directors in LEAs and State agencies. The provisions of this proposed rule would add flexibility to the existing hiring standards for new directors in order to address difficulties faced by program operators in finding qualified applicants.

### **Executive Order 13175**

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the

relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. FNS will notify Tribal leaders about this proposed rule to encourage public comments, and intends to brief Tribal leaders at one of the quarterly consultations or conference calls scheduled by the Office of Tribal Relations.

FNS has assessed the impact of this proposed rule on Indian tribes and determined that this rule does not, to our knowledge, have negative Tribal implications that require Tribal consultation under EO 13175. If a Tribe requests consultation on this rule, FNS will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress. We are unaware of any current Tribal laws that could be in conflict with the proposed provisions of this rule and anticipate that the proposed hiring flexibilities will benefit Tribal schools.

When implemented, the flexibilities provided by this rule are expected to increase the pool of candidates qualified to serve as new directors of school nutrition programs in small LEAs. This is expected to benefit Tribal communities, which often experience difficulty attracting qualified school nutrition personnel.

### **Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; 5 CFR 1320) requires the Office of Management and Budget (OMB) approve all collections of information by a



Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. The provisions of this proposed rule do not contain information collection requirements subject to approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995.

### **E-Government Act Compliance**

The Department is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

### **List of Subjects**

#### **7 CFR Part 210**

Children, Commodity School Program, Food assistance programs, Grant programs- health, Grant programs- education, School breakfast and lunch programs, Nutrition, Reporting and recordkeeping requirements.

#### **7 CFR Part 235**

Administrative practice and procedure, Food assistance programs, Grant programs- health, Grant programs- education, School breakfast and lunch programs, Nutrition, Reporting and recordkeeping requirements.

Accordingly, 7 CFR parts 210 and 235 are proposed to be amended as follows:

### **PART 210 – NATIONAL SCHOOL LUNCH PROGRAM**

1. The authority citation for part 210 continues to read as follows:

**Authority:** 42 U.S.C. 1751-1760, 1779.

2. Amend §210.30 by:

a. Revising paragraph (b)(1)(i) and;

b. In the table to paragraph (b)(2), in the column under the heading “Student enrollment 2,499 or less”, removing the words “school nutrition program experience” wherever they appear and adding in their place the words “food service experience”.

**§210.30 School nutrition program professional standards.**

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(b)\*\*\*

(1) \*\*\*

(i) School nutrition program directors with local educational agency enrollment of 2,499 students or fewer. Directors must meet the requirements in either paragraph (b)(1)(i)(A), (B), (C), or (D) of this section.

(A) A bachelor's degree, or equivalent educational experience, with an academic major or concentration in food and nutrition, food service management, dietetics, family and consumer sciences, nutrition education, culinary arts, business, or a related field;

(B) A bachelor's degree, or equivalent educational experience, with any academic major or area of concentration, and either a State-recognized certificate for school nutrition directors or at least one year of relevant food service experience. At the discretion of the State agency, and on a case-by-case basis, the relevant food service experience may be unpaid;

(C) An associate's degree, or equivalent educational experience, with an academic major or area of concentration in food and nutrition, food service management, dietetics, family and consumer sciences, nutrition education, culinary arts, business, or a related field and at least one year of relevant food service experience. At the discretion of the State agency, and on a case-by-case basis, the relevant food service experience may be unpaid; or

(D) A high school diploma or equivalency (such as the general educational development diploma), and at least three years of relevant food service experience. At the discretion of the State agency, and on a case-by-case basis, the relevant food service experience may be unpaid. Directors hired under this criterion are strongly encouraged to work toward attaining an associate's degree in an academic major in the fields listed in paragraph (b)(1)(i).

(E) For a local educational agency with less than 500 students, the State agency has discretion to approve the hire of a director who meets one of the educational criteria in paragraph (b)(1)(i)(A)-(D) but has less than the required years of relevant food service experience.

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## **PART 235 – STATE ADMINISTRATIVE EXPENSE FUNDS**

3. The authority citation for part 235 continues to read as follows:

**Authority:** Secs. 7 and 10 of the Child Nutrition Act of 1966, 80 Stat. 888, 889, as amended (42 U.S.C. 1776, 1779).

**§235.11[Amended]**

4. In paragraph (g)(1)(i), add at the end the words “or a bachelor’s degree with any academic major and a master’s degree with an academic major in areas including food and nutrition, food service management, dietetics, family and consumer sciences, nutrition education, culinary arts, business, or a related field;” and in paragraph (g)(1)(iv)(A), remove the words “Master’s degree” and add in their place the words “Both a bachelor’s degree and a master’s degree”.

Dated: January 16, 2018.

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Brandon Lipps  
Administrator  
Food and Nutrition Service  
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